IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

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J.F. ALLEN CORPORATION, a West Virginia Corporation, Plaintiff, v. THE SANITARY BOARD OF THE CITY OF CHARLESTON, WEST VIRGINIA, and BURGESS AND NIPLE, INC., an Ohio Corporation. Defendants.	Civil Action No. 14-C-1182 Judge Tod Kaufman

(14) Final

ORDER GRANTING DEFENDANT THE SANITARY BOARD OF THE CITY OF CHARLESTON'S MOTION TO DISMISS PLAINTIFF'S AMENDED COMPLAINT

This matter came on for hearing on the 2nd day of December, 2014, upon the motion to dismiss by Defendant, The Sanitary Board for the City of Charleston, West Virginia ("CSB"), for dismissal with prejudice of all claims asserted against it in the Amended Complaint pursuant to Rule 12(b)(6) of the West Virginia Rules of Civil Procedure. The Plaintiff, J.F. Allen Corporation ("J.F. Allen" or "Plaintiff"), appeared by counsel, Charles M. Johnstone, II. Defendant, Burgess and Niple, Inc. ("B&N"), appeared by counsel, Megan F. Bosak. Defendant CSB appeared in person by its Chief Engineer, Tim Haapala, and by its counsel, David Allen Barnette and Vivian H. Basdekis.

The Court heard the arguments of counsel, considered the memoranda filed, and reviewed all pertinent legal authorities. Based on these deliberations, and upon construing the allegations in the light most favorable to Plaintiff, the Court **FINDS** that the Amended Complaint, as pled, fails to state a claim against CSB pursuant to Rule 12(b)(6), and hereby

EXHIBIT C

DISMISSES Count I, alleging breach of contract, with prejudice. As discussed in greater detail below, the Court concludes that the breach of contract claim Plaintiff has pled in its Amended Complaint fails to state a claim upon which relief could be granted under the parties' Agreement, which establishes the law governing these parties. Based on the plain language of the Agreement, the Court finds that the risk of liability with respect to underground utilities was allocated to J.F. Allen, not CSB, and no claim for adjustment of price is valid if not timely submitted and preserved in accordance with the notice and claim protocol in the parties' Agreement. In so ruling, the Court makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

For purposes of this motion, this Court has examined the parties' fully-executed Agreement, which was referenced in the Complaint and attached to CSB's motion to dismiss at Exhibit A. Because it is undisputed that Plaintiff's breach of contract claim against CSB arises from the parties' written Agreement, the Court finds that the Agreement itself, the authenticity of which has not been disproven, is central to Plaintiff's claim and may be considered under Rule 12(b)(6).[1] Based on the Court's examination of the parties' Agreement and assuming, for purposes of this motion, that the factual allegations contained in the Complaint are true, the Court makes the following findings:

A. The Construction Agreement

1. On or about December 13, 2011, CSB, as Owner, and J.F. Allen, as Contractor, entered into a written construction Agreement for work generally described as "Kanawha Two-Mile Creek Sewer Improvements — Sewer Replacements Sugar Creek Drive Sub-Area, Contract 10-8" (the "Project"). (*See* Ex. C, Agreement at 1; *see also* Am. Compl. ¶ 5.)

[1] *See* Legal Standard discussion, appearing below at pages 11-12.

2. Pursuant to the Agreement, Defendant Burgess & Niple, Inc. provided professional services to CSB and was designated as the Engineer/Architect on the Project ("B&N" or "Engineer"). (*Id.* ¶ 2; *see also* Am. Compl. ¶¶ 6-7.)

3. The Agreement provided an original contract price of $5,160,621.75, "subject to additions and deductions by Change Order and quantities actually performed," required substantial completion by January 2, 2013, and required final completion by February 1, 2013. (*Id.* ¶ 4; *see also* Am. Compl. ¶¶ 8-10.)

4. The actual course of performance of the Project is clear on the record. Construction began on or about January 9, 2012. A total of six change orders and quantity adjustments increased the contract price in the amount of $394,977, for a final adjusted contract amount of $5,555,598.

5. Actual final completion of the Project occurred on August 15, 2013, six months after the February 1, 2013 final completion date established by the Agreement.

6. The one-year correction period under the Agreement expired on June 19, 2014, prior to the filing of the original Complaint in this action.

B. **Plaintiff Assumed Liability with Respect to Underground Facilities.**

7. Based on the several provisions of the Agreement, the Court finds that the risk of liability with respect to Underground Facilities[2] was contemplated by the parties at the time of contracting and was allocated to J.F. Allen, not CSB.

[2]The "General Conditions" of the Agreement define "Underground Facilities" as "[a]ll underground pipelines, conduits, ducts, cables, wires, manholes, vaults, tanks, tunnels, or other such facilities or attachments, and any encasements containing such facilities, including those that convey electricity, gases, steam, liquid petroleum products, telephone or other communications, cable television, water, wastewater, storm water, other liquids or chemicals, or traffic or other control systems."

8. The Court finds that, even prior to being awarded the Project, J.F. Allen received specific instructions concerning Underground Facilities. Paragraph 4.5 of the "Instructions to Bidders," which is incorporated in the Agreement, provides as follows:

> Before submitting a Bid, each BIDDER will be responsible to obtain such additional or supplementary examinations, investigations, explorations, tests, studies, and data concerning conditions (surface, subsurface, and Underground Facilities) at or contiguous to the site or otherwise, which may affect cost, progress, performance, or furnishing of the Work or which relate to any aspect of the means, methods, techniques, sequences, or procedures of construction to be employed by BIDDER and safety precautions and programs incident thereto or which BIDDER deems necessary to determine its Bid for performing and furnishing the Work in accordance with the time, price, and other terms and conditions of the Contract Documents.

(*See* Ex. A, Instructions to Bidders ¶ 4.5.)[3]

9. The "General Notes" to the Agreement also expressly provide, in no less than four separate provisions that, as Contractor, it was Plaintiff's sole responsibility to locate underground utilities and structures, to provide advance notice to utilities, and if damage occurs, to repair and restore the damaged service lines, the cost of all of which will be considered as having been included in the Contract Price, as follows:

> 2. UTILITIES AND STRUCTURES SHOWN ON THE PLANS. The location of utilities and structures, both surface and subsurface, are shown on the plans from data available at the time of design and are not necessarily complete or correct. ***The exact location and protection of all utilities and structures are the responsibility of the contractor.*** During construction, the contractor shall use due diligence to protect from damage all existing utilities and structures whether shown on the plans or not.
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> 4. EXPOSE UTILITIES AND STRUCTURES. Contractor shall expose subsurface utilities and structures sufficiently in advance of the proposed work to verify the location and resolve any conflicts. ***Cost for all locations exposed shall be incidental to the various items of work.*** If it is determined by the engineer/architect that relocation of existing utilities is

[3] Article 8 of the Agreement defines "Contract Documents," to include Bidding Requirements including Advertisement, Bids and Instructions to BIDDERS, and Supplementary Instructions.

necessary, such work shall be conducted in accordance with "Changes in the Work" of the General Conditions.

5. UTILITY SERVICE LINES. Existing utility service lines were not field located and are not shown on the plans. ***The Contractor shall be responsible for determining the location of the utility service lines. If damage is caused, the Contractor shall be responsible for repair or restoration of the damaged service lines to the satisfaction of the Owner and the utility company involved at no extra cost to the Owner.*** If repairs are authorized by the utility owner, they shall be made in accordance with their instructions.

6. NOTIFICATION — UTILITY COMPANIES. The Contractor shall notify Miss Utility (1-800-245-4848) of the construction starting date at least five working days prior to beginning any work. If utilities are broken or damaged by the Contractor, the utility owner shall be notified immediately to avoid inconvenience to customers and the utility owner. Temporary arrangements, as approved by the utility owner may be used until any damaged items can be permanently repaired. If repairs are authorized by the utility owner, they shall be made in accordance with their instructions. ***The Contractor will be solely responsible for all costs resulting from the damage, repair, restoration, and resulting contingent damage of affected utilities.***

(*See* Ex. B, General Notes, ¶¶ 2, 4-6 (emphasis added).)

10. To induce CSB to enter into the Agreement, Plaintiff represented that:

> CONTRACTOR acknowledges that OWNER and ENGINEER/ ARCHITECT do not assume responsibility for the accuracy or completeness of information and data shown or indicated in the Contract Documents with respect to Underground Facilities . . . .

(*See* Ex. C, Agreement, ¶ 7.4 (capitalization in original).)

11. Sections 4.04 of the "General Conditions," as amended in the "Supplemental Conditions," defines Plaintiff's responsibilities with respect to Underground Facilities, whether shown or not shown on the Contract Documents, as follows:

4.04 *Underground Facilities*

A. *Shown or Indicated:* The information and data shown or indicated in the Contract Documents with respect to existing Underground Facilities at or contiguous to the Site is based on information and data furnished to Owner or Engineer by the owners

of such Underground Facilities, including Owner, or by others. Unless it is otherwise expressly provided in the Supplementary Conditions:

1. Owner and Engineer shall not be responsible for the accuracy or completeness of any such information and data provided by others; and

2. *the cost of all of the following will be included in the Contract Price, and Contractor shall have full responsibility for*:

    a. *reviewing and checking all such information and data*;

    b. locating all Underground Facilities shown or indicated in the Contract Documents;

    c. coordination of the Work with the owners of such Underground Facilities, including Owner, during construction; and

    d. *the safety and protection of all such Underground Facilities and repairing any damage thereto resulting from the Work.*

3. Location of Subsurface Utilities.[4]

    a. The location of subsurface utilities is shown on the plans form information furnished by the utility owners.

    b. The CONTRACTOR shall, at least 2 working days, excluding Saturdays, Sundays, and legal holidays, prior to construction in the area of the subsurface utility, notify the subsurface utility Owner in writing, by telephone, or in person. The marking or locating shall be coordinated to stay approximately 2 days ahead of the planned construction.

    c. The CONTRACTOR shall alter immediately the occupants of nearby premises as to any emergency that he may create or discover at or near such premises.

    d. *The CONTRACTOR shall have full responsibility for coordination of the work with owners of such underground facilities during construction, for the safety and protection thereof as provided in paragraph 6.13 and repairing any damage thereto resulting from the work, the cost of all of which will be considered as having been included in the Contract Price.*

* * * *

[4] Section 4.04 of the "Supplemental Conditions" adds the following new paragraphs, i.e., ¶¶ 4.04.A.3 through 4.04.A7, immediately after ¶ 4.04.A.2 contained in the "General Conditions."

B. *Not Shown or Indicated:*

1. If an Underground Facility is uncovered or revealed at or contiguous to the Site which was not shown or indicated, or not shown or indicated with reasonable accuracy in the Contract Documents, ***Contractor shall, promptly after becoming aware thereof and before further disturbing conditions affected thereby or performing any Work in connection therewith (except in an emergency as required by Paragraph 6.16.A), identify the owner of such Underground Facility and give written notice to that owner and to Owner and Engineer.*** Engineer will promptly review the Underground Facility and determine the extent, if any, to which a change is required in the Contract Documents to reflect and document the consequences of the existence or location of the Underground Facility. During such time, Contractor shall be responsible for the safety and protection of such Underground Facility.

2. If Engineer concludes that a change in the Contract Documents is required, a Work Change Directive or a Change Order will be issued to reflect and document such consequences. An equitable adjustment shall be made in the Contract Price or Contract Times, or both, to the extent that they are attributable to the existence or location of any Underground Facility that was not shown or indicated or not shown or indicated with reasonable accuracy in the Contract Documents ***and that Contractor did not know of and could not reasonably have been expected to be aware of or to have anticipated.*** If Owner and Contractor are unable to agree on entitlement to or on the amount or extent, if any, of any such adjustment in Contract Price or Contract Times, Owner or Contractor may make a Claim therefor as provided in [¶] 10.05.

(*See* Ex. D, General and Supplemental Conditions, § 4.04 (emphasis added).)

12. The Court finds that, in its Amended Complaint, Plaintiff has not made any claim of timely "written notice," nor has it pled any specific facts to show that it followed the protocol for possible changes in the Contract Documents due to differing or unanticipated conditions arising from Underground Facility not shown or indicated on the Contract Documents. (*See* Ex. D, § 4.04(B).)

C. The Agreement Establishes the Procedure for Payments and Timely Submission of any Claims.

13. The Court finds that the agreed-upon protocols for all change orders, progress and final payments, as well as the precise procedures for filing, reviewing, and ruling on any Claim are established by the plain language of the Agreement.

14. Standard payment procedures, for instance, are expressly set forth in Article 5 of the Agreement, as follows: "CONTRACTOR shall submit Applications for Payment in accordance with Article 14 of the General Conditions. Applications for Payment will be processed by ENGINEER/ARCHITECT as provided in the General Conditions." (*Id.* ¶ 5.)

15. Article 10.05 of the Agreement allows for the submission of Claims, as follows:

> A. *Engineer's Decision Required:* All Claims, except those waived pursuant to Paragraph 14.09, shall be referred to the Engineer for decision. A decision by Engineer shall be required as a condition precedent to any exercise by Owner or Contractor of any rights or remedies either may otherwise have under the Contract Documents or by Laws and Regulations in respect of such Claims.
>
> B. *Notice:* Written notice stating the general nature of each Claim shall be delivered by the claimant to Engineer and the other party to the Contract promptly (but in no event later than 30 days) after the start of the event giving rise thereto. The responsibility to substantiate a Claim shall rest with the party making the Claim. Notice of the amount or extent of the Claim, with supporting data shall be delivered to the Engineer and the other party to the Contract within 60 days after the start of such event (unless Engineer allows additional time for claimant to submit additional or more accurate data in support of such Claim). A Claim for an adjustment in Contract Price shall be prepared in accordance with the provisions of Paragraph 12.01.B . . . .
>
> C. *Engineer's Action*: Engineer will review each Claim and, within 30 days after receipt of the last submittal of the claimant or the last submittal of the opposing party, if any, take one of the following actions in writing:
>
> 1. deny the Claim in whole or in part;
>
> 2. approve the Claim; or
>
> 3. notify the parties that the Engineer is unable to resolve the Claim if, in the Engineer's sole discretion, it would be inappropriate for the

Engineer to do so. For purposes of further resolution of the Claim, such notice shall be deemed a denial.

D. In the event that Engineer does not take action on a Claim within 30 days, the Claim shall be deemed denied.

E. Engineer's written action under Paragraph 10.05.C or denial pursuant to 10.05.C.3 or 10.05.D will be final and binding upon Owner and Contractor, unless Owner or Contractor invoke the dispute resolution procedure set forth in Article 16 within 30 days of such action or denial.

F. ***No Claim for an adjustment in Contract Price or Contract Times will be valid if not submitted in accordance with this Paragraph 10.05.***

(*See* Ex. C, Agreement ¶ 10 (emphasis added).)

16. Similarly, Article 12.01 provides that "[t]he Contract Price may only be changed by a Change Order. Any Claim for an adjustment in the Contract Price shall be based on written notice submitted by the party making the Claim to the Engineer and the other party to the Contract in accordance with the provisions of Paragraph 10.05." (*Id.* ¶ 12.01.)

17. Article 12.03 of the Agreement provides several key provisions governing Delays, which bar the recovery of damages for delay under the following circumstances:

C. If Contractor is delayed in the performance or progress of the Work by . . . . failures to act of utility owners not under the control of Owner, or other causes not the fault of and beyond control of Owner and Contractor, then Contractor shall be entitled to an equitable adjustment in Contract Times, if such adjustment is essential to Contractor's ability to complete the Work within the Contract Times. Such an adjustment shall be Contractor's ***sole and exclusive remedy for the delays*** described in this Paragraph 12.03.C.

E. ***Contractor shall not be entitled to an adjustment in Contract Price or Contract Times for delays within the control of Contractor.*** Delays attributable to and within the control of a Subcontractor or Supplier shall be deemed to be delays within the control of Contractor.

(Ex. C, Agreement § 12.03(C), §12.03(E) (emphasis added).)

18. Article 14.07, governing Final Payment, provides in subsection C that payment becomes due as follows: "[Forty-five] days after the presentation to Owner of the Application for

Payment and accompanying documentation, the amount recommended by Engineer, less any sum Owner is entitled to set off against Engineer's recommendation, including but not limited to liquidated damages, will become due and will be paid by Owner to Contractor." (Ex. D, General Conditions ¶ 14; Supplementary Conditions ¶ 14.07.)

19. The Agreement further provides that "[t]he making and acceptance of final payment will constitute" a waiver of claims as follows:

> 1. A waiver of all Claims by Owner against Contractor . . . ; and
>
> 2. *A waiver of all Claims by Contractor against Owner other than those previously made in accordance with the requirements herein and expressly acknowledged by Owner in writing as still unsettled.*

(*See* Ex. C, Agreement ¶ 14.09 (emphasis added).)

20. After examining the foregoing Agreement procedures, the Court finds that Plaintiff failed to timely submit its claim for change or equitable adjustment of the Contract Price.

21. On or about November 4, 2013, Plaintiff submitted its request for Final Payment.

22. On November 5, 2013, B&N submitted its written recommendation to CSB for Final Payment to J.F. Allen, with a copy issued to Plaintiff and the West Virginia Department of Environmental Protection.

23. On or about November 20, 2013, CSB issued Final Payment, check no. 2068, in the amount of $143,320.43 to J.F. Allen.

24. On or about May 7, 2014, approximately six months after J.F. Allen's request for Final Payment and B&N's recommendation for Final Payment had been made, J.F. Allen submitted a request to B&N for equitable adjustment under the Agreement.

25. On May 12, 2014, B&N returned J.F. Allen's request, noting that under the Agreement, "B&N is no longer authorized to provide professional services for this project."

LEGAL STANDARD

The Court finds that the following legal standards are applicable and govern the motion at issue:

26. West Virginia law with respect to appraising the sufficiency of a complaint on a motion to dismiss is well established. A defendant is entitled to dismissal if the plaintiff's complaint fails to state a claim upon which relief can be granted. W. Va. R. Civ. P. 12(b)(6). In considering a Rule 12(b)(6) motion, this Court is required to take all well-pleaded allegations as true, in the light most favorable to the plaintiff. *See Price v. Halstead*, 177 W. Va. 592, 355 S.E.2d 380 (1987). That said, "the plaintiff is still required at a minimum to set forth sufficient information to outline the elements of his/her claim. If a plaintiff fails to do so, dismissal is proper." Franklin D. Cleckley et al., *Litigation Handbook on West Virginia Rules of Civil Procedure*, 289-90 (2002). Further, while the Court must assume that all alleged facts are true, "[i]t is not . . . proper to assume that the [plaintiff] can prove any facts that it has not alleged." *Associated Gen. Contractors of Calif. Inc. v. Calif. State Council of Carpenters*, 103 S. Ct. 897, 902 (1983).

27. This Court also recognizes that Rule 12(b)(6) permits courts to consider matters outside the pleadings when those matters are referenced in the complaint and integral to the plaintiff's claims. *E.g., Ballard v. Fifth Third Bank*, 2010 WL 3359572 (S.D.W. Va. Aug. 23, 2010) (permitting contract integral to plaintiff's claim to be considered in deciding motion to dismiss); *Forshey v. Jackson*, 222 W. Va. 743, 747-48, 671 S.E.2d 748, 752-53 (2008)

(recognizing exceptions to general rule that consideration of matters outside the pleadings converts a 12(b)(6) motion into one for summary judgment).

28. Under West Virginia procedure, "[t]he mere fact that documents are attached to a Rule 12(b)(6) motion to dismiss does not require converting the motion to a Rule 56 motion for summary judgment." Franklin D. Cleckley, et al., *Litigation Handbook on West Virginia Rules of Civil Procedure*, at 394-95 (4th ed. 2012). Instead, under the doctrine of "incorporation by reference" a document attached to a motion to dismiss "may be considered by the trial court, without converting the motion into one for summary judgment, only if the attached document is (1) central to the plaintiff's claim, and (2) undisputed. Undisputed means that the authenticity of the document is not challenged. ***For example, in a case involving a contract, a court may examine the contract documents in deciding a motion to dismiss.***" *Id* (emphasis added). Thus, the Court may consider, in addition to the pleadings, "materials embraced by the pleadings." *Id.* at 395 n. 1216 (collecting cases; *see, e.g.*, *Edes v. Verizon Communications, Inc.*, 417 F.3d 133 (1st Cir. 2005) ("Where . . . a complaint's factual allegations are expressly linked to — and admittedly dependent upon — a document (the authenticity of which is not challenged), that document merges into the pleadings and the trial court can review it in deciding a motion to dismiss under Rule 12(b)(6).")).

CONCLUSIONS OF LAW

Based on the foregoing, the Court hereby makes the following conclusions of law:

29. Count I is a breach of contract claim. Under West Virginia law, for any claim based on written or oral contract, the essential elements required for any claim based on written or oral contract is the existence of a valid contract, its material breach, and damages.

30. It is undisputed that the Agreement is a valid and enforceable contract whose unequivocal terms were freely negotiated and agreed to by sophisticated parties.

31. Under West Virginia law, "it is the province of the court and not of the jury, to interpret a written contract," which must be applied according to its terms. *Stephens v. Bartlett,* 118 W. Va. 421, 191 S.E. 550, 552 (1937).

32. In its Amended Complaint, Plaintiff claims that it is entitled to recover, from CSB, alleged "extra costs" and delay damages based on unforeseen changes, including the discovery of underground utilities. These, however, are precisely the types of claims that the Contract Documents intended to preclude.

33. The Court concludes that under the Agreement itself CSB owes no such obligation to Plaintiff related to Underground Facilities. As between CSB and Plaintiff, the Agreement contemplated that Plaintiff would bear the risk of any of the difficulties that might arise from conditions on the Project related to unforeseen locations of Underground Facilities. For instance, the responsibility to investigate and discover Underground Facilities was solely Plaintiff's responsibility. Under "Instructions to Bidders," Plaintiff was responsible to obtain additional examinations, investigations, tests, and data "concerning conditions (surface, subsurface, and Underground Facilities) at or contiguous to the site . . . ." (Ex. A at ¶ 4.5.) By contrast, Plaintiff acknowledged that CSB "do[es] not assume responsibility for the accuracy or completeness of information and data shown or indicated in the Contract Documents with respect to Underground Facilities at or contiguous to the site." (Ex. C at ¶ 7.4.)

34. In addition, the parties clearly contemplated (and addressed) the possibility of construction delays and costs arising from Underground Facilities. Their Agreement places the financial risk of encountering or repairing those Underground Facilities on Plaintiff, as the

Contractor, not on CSB, as the Owner. *See, e.g.*, Ex. B ¶ 2 ("The exact location and protection of all utilities and structures are the responsibility of the Contractor. During construction, the Contractor shall use due diligence to protect from damage all existing utilities and structures whether shown on the plans or not."); ¶ 4 ("Cost for all [subsurface utilities and structures] exposed shall be incidental to the various items of work."); ¶ 5 ("If damage is caused, the Contractor shall be responsible for repair or restoration of the damaged service lines . . . at no extra cost to the Owner."); ¶ 6 ("The Contractor will be solely responsible for all costs resulting from the damage, repair, restoration, and resulting contingent damage of affected utilities."). Moreover, Section 4.04 of the General and Supplemental Conditions specifies the method by which Plaintiff may obtain possible contract adjustments due to unanticipated conditions arising from an Underground Facility not indicated in the Contract Documents.

35. Generally, under these circumstances, there can be no recovery for delay damages when delays are specifically anticipated by the parties and contemplated in the contract. *See Corinno Civetta Const. Corp. v. City of New York*, 67 N.Y.2d 297, 314-15, 502 N.Y.S.2d 681, 689 (1986) (recognizing principle that, if the owner makes a factual showing sufficient to establish as a matter of law that the delays which actually occurred were initially contemplated by the parties as potential events on the project, and the contractor does not demonstrate triable issues of fact as to whether the owner acted in bad faith or with reckless indifference to the contractor's rights, the contractor's delay claim will be subject to dismissal); *see also* 22 A N.Y. Jur. 2d Contracts § 431 (A contractor will not be allowed to recover damages for delay where the parties foresaw the possibility that subsurface conditions at the site might materially differ from those shown in the contract plans and changes in the work were contemplated by contract, which also provided for methods of payment for changes.) Thus, when delays are contemplated in the

contract, as they were here, they become reasonably foreseeable and delay damages may not be recovered.

36. Even if, assuming *arguendo*, Plaintiff did not know and could not reasonably be expected to anticipate the existence or location of an Underground Facility, the Agreement only provides a limited means for possible adjustment to the Contract Documents. Strict compliance with protocol is necessary to preserving any such claim.

37. The Agreement provides in § 4.04(B) that any possible change due to differing or unanticipated conditions involving Underground Facilities not shown or indicated in the Contract Documents requires (i) Plaintiff's prompt written notice to CSB and the Engineer, (ii) the Engineer's determination that a change, if any, is required in the Contract Documents to reflect and document the consequences of the existence or location of the Underground Facility; and (iii) if the Engineer concludes that a change in the Contract Documents is required, a Work Change Directive or Change Order will be issued to reflect and document such consequences. Finally, if Owner and Contractor are unable to agree on entitlement to or on the amount or extent, if any, of any such adjustment in Contract Price or Contract Time, Owner or Contractor may make a Claim as provided in Paragraph 10.05.

38. By failing to give timely written notice to allow for the Engineer's determination and, if warranted, the issuance of a Change Order, Plaintiff has not met the condition precedent to recovery under the Claims procedures or the Change of Contract Price provisions expressly set forth in the Agreement. (*Id.* ¶¶ 4.04(B), 10.05, 12.) The Agreement unequivocally provides that *"[n]o Claim for an adjustment in Contract Price . . . will be valid if not submitted in accordance with [the Claims procedure of] this Paragraph 10.05."* (*See* Ex. A ¶ 10.05(A)-(F) (emphasis added); *see also id.* ¶ 12.01(A) ("The Contract Price may only be changed by a Change Order.

Any Claim for an adjustment in the Contract Price shall be based on written notice submitted . . . in accordance with the provisions of Paragraph 10.05."). Accordingly, the Court concludes that to preserve any valid Claim, Plaintiff was required to follow the procedures in the Agreement, which it has not done.

39. In particular, to comply with Paragraph 10.05, Plaintiff was required, in part, to provide written notice of its Claim, no later than thirty days after the start of the event giving rise to the Claim, and to allow for B&N to render its decision. (*See* Ex. A, Agreement ¶ 10.05.) Although compliance with the precise requirements of Paragraph 10.05 is a condition precedent to any recovery on a Claim, Plaintiff failed to plead any specific facts to establish that the claim raised here was ever submitted in accordance with the Paragraph 10.05 protocol. Absent doing so, "[n]o Claim for an adjustment in Contract Price . . . will be valid." *Id.*

40. The Agreement further provides that Claims not timely asserted within the life of the contact are time-barred. Article 14.07, governing Final Payment, provides that payment becomes due as follows:

> [Forty-five] days after the presentation to Owner of the Application for Payment and accompanying documentation, the amount recommended by Engineer, less any sum Owner is entitled to set off against Engineer's recommendation, including but not limited to liquidated damages, will become due and will be paid by Owner to Contractor.

(*Id.* General Conditions ¶ 14; Supplementary Conditions § 14.07.) The Agreement expressly provides that "[t]he making and acceptance of final payment will constitute . . . a waiver of all Claims by Contractor against Owner other than those previously made in accordance with the requirements herein and expressly acknowledged by Owner in writing as still unsettled." (*See* Ex. A, Agreement ¶ 14.09.) Despite this provision, Plaintiff does not allege in its Amended

Complaint that its claim for adjustment of the contract price, asserted herein, was "previously made . . . and expressly acknowledged by Owner in writing as still unsettled." *Id.*

41. The Court thus concludes that, by operation of the Agreement, CBS's obligations to J.F. Allen terminated with the actual completion of the Project and its issuance of Final Payment. At that time, there were no then-existing Claims that had been properly raised and preserved in accordance with the agreed-upon procedures set forth in the Agreement. By failing to give proper and timely notice of its Claim under the Agreement, the Court concludes that Plaintiff has not met the conditions precedent to the recovery it seeks. (*Id.* ¶¶ 4.04, 10, 12.) Furthermore, applying the plain, unambiguous terms of the Agreement, Plaintiff's failure to make and preserve its Claim prior to Final Payment constitutes a waiver of the Claim. (*Id.* ¶ 14.) *Cf., Appeal of Elco Corp.*, ASBCA No. 12149, 70-2 BCA P 8373 (1970) (affirming dismissal of plaintiff's equitable adjustment claims arising under a government construction contract where claims were not asserted prior to final payment under the respective contracts).

42. Because the fulfillment of the Agreement terms is a condition precedent to the pursuit of this breach of contract claim, the Court concludes that the Amended Complaint fails to state a valid claim upon which relief can be granted and should be dismissed with prejudice.

43. In accord with Rule 54 of the West Virginia Rules of Civil Procedure, this Order constitutes final judgment as it relates to the Plaintiff's claims against the Sanitary Board of the City of Charleston, West Virginia and therefore it is expressly held that there is no just reason for delay.

RULING

WHEREFORE, as discussed herein and having found a failure to state a claim upon which relief could be granted, the Court does hereby **ORDER** that CSB's motion to dismiss is

GRANTED and Count I, alleging breach of contract, is hereby **DISMISSED WITH PREJUDICE.**

It is further **ORDERED** that, in accord with Rule 54 of the West Virginia Rules of Civil Procedure, this constitutes a final judgment and there is no just reason for delay.

Any and all objections are noted and preserved in the record.

It is **SO ORDERED.**

The Clerk is directed to enter the foregoing and to forward attested copies of this Order to all counsel of record and to retain this action on the active docket of the Court as to the remaining parties only.

January 5, 2015

HONORABLE TOD KAUFMANN
JUDGE OF THE CIRCUIT COURT OF
KANAWHA COUNTY, WEST VIRGINIA

STATE OF WEST VIRGINIA
COUNTY OF KANAWHA, SS
I, CATHY S. GATSON CLERK OF CIRCUIT COURT OF SAID COUNTY AND IN SAID STATE, DO HEREBY CERTIFY THAT THE FOREGOING IS A TRUE COPY FROM THE RECORDS OF SAID COURT GIVEN UNDER MY HAND AND SEAL OF SAID COURT THIS 6th DAY OF January 2015
Cathy S. Gatson CLERK
CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

Presented by:

Vivian H. Basdekis

David Allen Barnette (WVSB #242)
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